

# Liability in BUMDes Bankruptcy

**Kustiono Kastaji**

Hang Tuah University, Surabaya, Indonesia

Email: kastajikustiono@gmail.com

## ARTICLE INFO

Date received : 18 December 2020

Revision date : 10 January 2021

Date received : 24 February 2021

### Keywords:

BUM Desa, Bankruptcy

Responsibility

Supervisors

## ABSTRACT

This research uses judicial normative research methodology since the research is aimed to evaluate the regulations found in the formal rules and regulations related to the BUM Desa or village-owned company and the company bankruptcy, namely Regulations Number 6 year 2014 regarding the Village and Regulations Number 37 year 2004 regarding Bankruptcy and the Deferral of Obligation Payment Code and connect with responsibility of village head. The research conclusions show that: firstly, BUM Desa is initially a business entity without having the status as a legal entity, but during its development, it might have the status of a legal entity. Secondly, Supervisors can be responsible for bankruptcy of BUMDes if it is proven that their fault has caused BUMDes to go Bankruptcy

### Corresponden Author:

Email: kastajikustiono@gmail.com

Article with open access under license



## INTRODUCTION

Law Number 6 of 2014 (Nomor, 6AD) concerning Villages was made in order to consider the existence of villages that have rights of origin and traditional rights in regulating and managing the interests of their village communities as part of realizing the ideals of independence and creating a strong foundation in implementing governance and development towards a fair, safe and prosperous society (Hukumonline.com, n.d.).

Law Number 6 of 2014 (Yustisia, 2015) concerning Villages also regulates village authority as a form of village independence, namely in the context of village autonomy. One of them is by forming a business entity called a Village-Owned Enterprise (Nomor, 6AD).

The provisions regarding Village-Owned Enterprises are regulated in Law Number 6 of 2014 concerning Villages in Chapter X Article 87. Village-Owned Enterprises are business entities whose entire or most of the capital is owned by the Village through direct participation from Village assets that

is separated in order to be able to manage assets, services, and other businesses for the maximum welfare of the Village community (Ramadana, 2013).

The unclear regulations related to the juridical construction of village-owned enterprises can certainly causing problems in the case of the Village-Owned Enterprises is unable to pay loan or other debts if they experience business losses. Whereas the juridical construction of a business entity as a legal subject will determine the extent of the agency's or management's or supervisor's responsibility to pay debt obligations in the case of bankruptcy and related to bankruptcy filings as regulated in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (Nomor, 6AD) .

Based on the background above, this study tries to find out and analyze the juridical construction of Village-Owned Enterprises as legal subjects in Indonesia as well as bankruptcy filings from Village-Owned Enterprises according to Law

Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations in the case of a risk of bankruptcy (Amalia, 2015).

Based on the description above, the problem formulations to be raised are as follows:

1. Is BUMDes an entity that can be bankrupt?
2. What are the Responsibilities of Supervisors for Bankruptcy of village-owned enterprises?

## METHOD

This study used a normative juridical research method because this research tried to examine the legal norms that is contained in the applicable laws and regulations related to Village-Owned Enterprises and related to bankruptcy of business entities, namely Law Number 6 of 2014 concerning Villages and Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations to be linked with the responsibilities of the village head.

## RESULTS AND DISCUSSION

### A. Characteristics of Legal Entities from Village-Owned Enterprises

#### 1. Data 122

Village-owned enterprises (BUM Desa) are business entities that have been regulated in Law Number 6 of 2014 concerning Villages. Article 87 of the Law on Villages states that Villages can establish BUM Desa. The existence of the BUM Desa aims to increase the financial capacity of the village government in government administration and increase community income through various business activities that are in accordance with the needs and potential of the village.

BUM Desa as a business entity established by a village based on the authority granted by Law Number 6 of 2014 (*UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 7 TAHUN 2014 TENTANG PERDAGANGAN*, 2014) concerning Villages, it is necessary to carry out further analysis regarding its position as one of the legal subjects in Indonesia so that its rights and obligations in law can be identified especially in the explanation of article 87 of the Law on Villages, it is explained that BUM Desa specifically cannot be equated with legal entities such as limited liability companies, CV, or cooperatives (Shidarta & Revisi, 2006).

The comparison of the character of the BUM Desa with the requirements that must

be met by a legal entity can be seen in the following table:

**Table 1**  
**Fulfillment of requirements for BUM Desa as a Legal Entity.**

| Legal Entity Requirements       | Characteristics of BUM Desa  |
|---------------------------------|--|
| Material Requirements           |  |
| a. Separate assets;             | <p>BUM Desa has assets separated from the assets of its members. This turns out in:</p> <ul style="list-style-type: none"> <li>• Article 1 number 6 Law on Villages <i>"Village-Owned Enterprises, hereinafter referred to as BUM Desa, are business entities whose entire or most of the capital is owned by the Village through direct participation originating from separated Village assets to manage assets, services, and other businesses for the greatest possible village community welfare"</i>.</li> <li>• Article 135 of Government Regulation Number 43 of 2014 <ul style="list-style-type: none"> <li>1) <i>The initial capital for the BUM Desa comes from Village APB</i></li> <li>2) <i>Assets of BUM Desa are village assets that are separated and not divided into shares.</i></li> <li>3) <i>Village-owned enterprises capital consists of:</i> <ul style="list-style-type: none"> <li>a. <i>Village equity capital; and</i></li> <li>b. <i>Village community equity capital</i></li> </ul> </li> <li>4) <i>Village equity capital as referred to in paragraph (3) letter a originate from the Village APB and other sources.</i></li> <li>5) <i>Village equity capital originating from Village APB as referred to in paragraph (4) may originate from:</i> <ul style="list-style-type: none"> <li>a. <i>fresh funds;</i></li> <li>b. <i>Government assistance;</i></li> <li>c. <i>local government assistance; and</i></li> <li>d. <i>Village assets submitted to Village APB</i></li> </ul> </li> </ul> </li> </ul> |
| b. There is a specific purpose; | <p>In its establishment, the BUM Desa has the objectives stated in the regional regulations and village regulations that gave birth to the BUM Desa, these objectives are different for each BUM Desa depending on the</p>   |

|  |  |  |
|--|--|--|
|  | <p>village deliberations at the time of the formation of the BUM Desa.</p> <p>For example in the Sidoarjo Regency Regional Regulation Number 4 of 2009, Article 3 states:</p> <p><i>"The purpose of establishing BUMDes is to:</i></p> <ol style="list-style-type: none"> <li><i>1. Increase the role of village communities in managing other legitimate sources of income;</i></li> <li><i>2. To develop economic activities of village communities, in village business units;</i></li> <li><i>3. Developing informal sector businesses to absorb the workforce of the community in the village;</i></li> <li><i>4. Increasing the entrepreneurial creativity of low-income village community members. "</i></li> </ol> |  |
| c. Has its own rights and obligations; | <p>A legal entity has its own obligations, this is because a legal entity is a legal subject that is the bearer of rights and obligations. For example the right to have land rights. However, BUM Desa in statutory regulations is not regulated regarding the rights and obligations it has.</p>   |  |
| d. Can prosecute and sue;              | <p>Regarding the authority of BUM Desa to prosecute and sue it is not explicitly explained in the laws and regulations but in article 138 paragraph (1) it states:</p> <p><i>"Operational executives in the arrangement and management of village businesses represent the BUM Desa inside and outside the court"</i></p> <p>From this clause, it can be concluded that basically BUM Desa can proceed in court by being represented by the operational executor or organ management.</p>  | <p>(5) <i>The advisor as referred to in paragraph (4) letter a is held ex-officio by the Village head.</i></p> <p>(6) <i>The operational executor as referred to in paragraph (4) letter b shall be an individual who is appointed and dismissed by the Village head.</i></p> <ul style="list-style-type: none"> <li>Article 133 of Government Regulation Number 43 of 2014. (related to the authority of advisory organizations)</li> </ul> <p>(1) <i>advisor as referred to in Article 132 paragraph (4) letter a has the task of supervising and providing advice to operational executives in carrying out arrangement and management activities of Village businesses.</i></p> <p>(2) <i>In carrying out the duties referred to in paragraph (1), the advisor shall have the authority to request an explanation from the operational executor regarding the management and management of Village businesses.</i></p> <ul style="list-style-type: none"> <li>Article 134 of Government Regulation Number 43 of 2014. (regarding the authority to implement operations).</li> </ul> <p><i>"The operational executor as referred to in Article 132 paragraph (4) letter b has the task of arranging and managing Village-Owned Enterprises in accordance with the articles of association and by-laws."</i></p> |
| e. Have a regular organization         | <p>BUM Desa has a regular organization, this can be seen in each of the articles of association and by-laws, as well as regulated in the laws and regulations related to BUM Desa, namely:</p> <ul style="list-style-type: none"> <li>Article 132 of Government Regulation Number 43 of 2014. (related to organs)</li> </ul> <p>(4) <i>The BUM Desa management organization as referred to in paragraph (1) shall at least consist of:</i></p> <ol style="list-style-type: none"> <li><i>a. advisor; and</i></li> <li><i>b. operational executor.</i></li> </ol>   | <p><b>Formal Requirements</b></p> <p>Applicati on for legal entity status</p> <p>The application for the status of a BUM Desa legal entity has not been regulated in the existing laws and regulations. The Village Law only states that BUM Desa can become a legal entity which will then still be regulated in further regulations. Therefore, it means that BUM Desa has not fulfilled the formal requirements of a legal entity because it has not submitted an application for legal entity status to the relevant agency, considering that there are no further regulations governing it.</p>   |

Source: Data Processed From Primary And Secondary Legal Materials.

The table above shows that a BUM Desa is a business entity that is not a legal entity because it has not met some of the requirements of a legal entity, where these requirements are cumulative. BUM Desa does not fulfill formal requirements, which is one of the important requirements as a legal entity in Indonesia, this is because legal actions that are carried out by administrators of a legal entity that have not been registered are considered personal actions of the management. The formal requirements related to registration should have been regulated in the laws and regulations, but until now there has been no such regulation (Ridwan, 2006).

However, as a business entity that is not a BUM Desa legal entity is very capable of increasing the status of its business entity to become a legal entity. This is as evident in the Elucidation of Article 87 paragraph (1) of Law Number 6 of 2014 concerning villages which states:

*"BUM Desa in its activities is not only oriented towards financial benefits, but also oriented to support the improvement of the welfare of the Village community. BUM Desa is expected to develop business units in empowering economic potential. In the case that business activities can run and develop well, it is very possible that the BUM Desa will follow the legal entity that has been stipulated in the provisions of the legislation."*

The clause above, if interpreted further, means that BUM Desa was originally an unincorporated business entity which in its development if possible, that is, if the BUM Desa is developing properly it can be converted into a legal entity based on existing statutory regulations.

Based on the analysis that has been stated above, a conclusion can be drawn that BUM Desa is a business entity that is not a legal entity, but in its development BUM Desa can be converted into a legal entity based on the existing laws and regulations, thus if it is made in the form of a chart below, the location of village-owned enterprises is in two places, namely BUM Desa which is not a legal entity and BUM Desa which is a legal entity.

To be able to find out that BUM Desa is explicitly stated that BUM Desa is a legal entity or not, it is necessary to look at the Village Law. In the explanation of the Village Law, it can be seen explicitly that BUM Desa is a business entity without a legal entity because in the explanation of Article 87 paragraph (1) of Law Number 6 of 2014 concerning villages when interpreted as *a contrario* it is found that BUM Desa can be increased to become Business entities that are legal entities

based on regulations that will be regulated later mean that before the village-owned enterprises were upgraded to become legal entities, village-owned enterprises were non-legal entities. This is of course different from the legal entities of Limited Liability Companies, Cooperatives or Foundations which in Law Number 40 of 2007 concerning Limited Liability Companies, Law Number 25 of 1992 concerning Cooperatives, and Law Number 16 of 2001 concerning Foundations are explicitly stated that Limited Liability Companies, Cooperatives, and foundations are legal entities (Kementerian Desa, Tertinggal, & Transmigrasi, 2014).

To be able to find out the characteristics of a BUM Desa as a business entity that is either a legal entity or not, it can be seen from the laws and regulations that form the Village-Owned Enterprise.

The laws and regulations regarding villages include:

1. Law Number 6 of 2014 concerning Villages;
2. Government Regulation Number 43 of 2014 concerning Implementing Regulations of Law Number 6 of 2014 concerning Villages;
3. Regulation of the Minister of Villages, Development of Underdeveloped Areas, and Transmigration Number 4 of 2015 concerning the Establishment, Arrangement and Management and dissolution of Village-Owned Enterprises
4. Regional Regulations and Village Regulations, regional regulations and village regulations here are different for each region considering that the existence of the BUM Desa is regulated by the regional regulations of each BUM Desa is located which then the BUM Desa is formed based on the existence of Village regulations but the regulations made still refer to the regulations above which are general in nature.

Law Number 6 of 2014 concerning Villages itself only provides a brief explanation regarding the characteristics of Village-Owned Enterprises, this is considering that the Law only regulates in general terms which then technically and in detail will be regulated in the regulations below which are hierarchically under the Law. As for the characteristics of the BUM Desa contained in Law Number 6 of 2014 concerning Villages, it can be seen in the Elucidation of Article 87 paragraph (1) of Law Number 6 of 2014 concerning villages which states:

*"BUM Desa was formed by the Village Government to utilize all economic potential,*

*economic institutions, as well as the potential of natural resources and human resources in order to improve the welfare of the Village community.*

*BUM Desa specifically cannot be equated with a legal entity such as a limited liability company, CV, or cooperative. Therefore, BUM Desa is a village-characterized business entity which in the implementation of its activities is in addition to assisting the implementation of Village Government, as well as meeting the needs of the Village community. BUM Desa can also carry out service functions, trade, and other economic development.*

*In increasing the source of village income, BUM Desa can collect savings at the local scale of the Village community, among others through managing revolving funds and savings and loans.*

From the contents of the elucidation of Article 87 paragraph (1) of Law Number 6 of 2014 concerning Villages, it can be interpreted that BUM Desa is a Business Entity with village characteristics that is different from other existing business entities such as CV and PT (Limited Liability Company). The characteristics of this village are what distinguishes BUM Desa from other business entities (Suherman, 1979).

The different characteristics of the village are then regulated in more detail in Government Regulation Number 43 of 2014 concerning Implementing Regulations for Law Number 6 of 2014 concerning Villages (Pemerintahan Desa, 2014), Regulation of the Minister of Villages, Development of Underdeveloped Areas, and Transmigration Number 4 of 2015 concerning Establishment (Ambarwati, 2018), Arrangement and Management and dissolution of Village-Owned Enterprises and Village Regulations where BUM Desa has legal status (Ramadana, 2013).

### **Responsibilities of Supervisors for Village-Owned Enterprises Bankruptcy**

As explained in the Government Regulation of the Republic of Indonesia Number 43 of 2014 concerning Implementation Regulations of Law Number 6 of 2014 concerning Villages. Article 138 of Law Number 6 Year 2014 states:

- (1) Operational executors in the arrangement and management of Village businesses shall represent the BUM Desa inside and outside the court.

- (2) Operational executor is obliged to report accountability for arrangement and management of BUM Desa to the Village head on a regular basis.

Article 139 explains that losses experienced by BUM Desa are the responsibility of the operational executor of the BUM Desa. Meanwhile, Article 140 states that:

- (1) BUM Desa bankruptcy can only be filed by the Village head.
- (2) BUM Desa bankruptcy as referred to in paragraph (1) shall be implemented in accordance with the mechanism that is stipulated in the provisions of the legislation.

The BUMDes itself has a supervisory organ. Supervisor consists of:

1. Chairman
2. Deputy Chairman who is concurrently a member
3. The secretary who is concurrently a member
4. Members

Supervisors have the obligation:

1. Hold a General Meeting to discuss the performance of BUM Desa at least once a year.

Supervisors are also authorized to hold a Supervisors General Meeting to:

1. Selection and appointment of supervisors.
2. Determination of policies for the development of business activities of BUM Desa.
3. Monitoring and evaluating the performance of Operational Executors.

With the explanation above, it is clear that the role of supervisors is quite important in the management of BUMDes. Supervisors are also responsible if they are proven to have committed deliberately or negligently in carrying out their obligations or authorities so as to harm BUMDes.

There are two terms that refer to liability in the legal dictionary, namely liability and responsibility. Liability is a broad legal term that refers to almost any character of risk or responsibility, certain, dependent or which may include all actual or potential characteristics of rights and obligations such as losses, threats, crimes, costs or conditions that create the task of carrying out the law. The concept of Responsibility is a matter that is accounted for an obligation, and includes decisions, skills, and abilities including the obligation to be responsible for the law that is being implemented. In practical terms and usage, the term liability refers to legal responsibility, namely liability due to mistakes that is carried out by legal subjects, while

the term responsibility refers to political responsibility.

Regarding the issue of official accountability according to Kranenburg and Vegtig, there are two theories that underlie it, namely:

- a. *fautes personnelles theory*, is a theory which states that losses to third parties are borne by officials because of their actions have caused losses. In this theory, the burden of responsibility is placed on humans as individuals.
- b. *fautes de services theory*, is a theory states that losses to third parties are borne by the agency of the official concerned. According to this theory, responsibility falls to the position. In its application, the losses incurred are also adjusted to whether the mistakes committed are serious or minor mistakes, where the weight and lightness of an error has implications for the responsibility that must be borne.

In general, the principles of responsibility in law can be distinguished as follows:

1. The Principle of Liability based on the Elements of Fault

The principle of liability is based on the element of fault (fault liability or liability based on fault) is a fairly general principle applicable in criminal and civil law. In BW, especially articles 1365, 1366, and 1367, this principle is held firmly. This principle states that a person can only be held accountable legally if there is an element of fault.

Article 1365 BW which is commonly known as an article concerning acts of violating the law, requires the fulfillment of four main elements, namely:

- a. there is an act;
- b. there is an element of fault;
- c. any losses suffered;
- d. there is a causal relationship between fault and losses.

What is meant by fault is an element that is against the law. The definition of law is not only contrary to law but also decency and morality in that society. While the losses here are not only material losses but also immaterial losses.

1. The Principle of Presumption of Always Liable

This principle states that the defendants are always presumed liable (the presumption of liability principle), until they can prove that they are innocent. The word "presumed" in the principle of "presumption of liability" is important, because there is a possibility that the defendant will release himself/herself from

liability, that is, in the event that he/she can prove that he/she has "taken" all the necessary actions to avoid the loss.

In this principle, it is regulated that the burden of proof is on the defendant. In this case, the burden of proof is reversed (*omkering van bewijslast*). This is certainly contrary to the presumption of *innocence principle*. However, if applied in the consumer's case, it will seem that this principle is quite relevant. If this theory is used, it is the business actor who is sued to have the obligation to prove the fault. The defendant must present evidence that he/she is innocent. Of course the consumer cannot casually file a lawsuit. The position of consumers as plaintiff is always open to being sued by business actors, if they fail to show the defendant's fault.

2. The Principle of Presumption Not Always Liable

This principle is the opposite of the second principle, the principle of the presumption of not always liable is known only in a very limited scope of consumer transactions. An example of the application of this principle is found in the law of carriage. Loss or damage to cabin baggage or hand luggage, which is usually carried and supervised by the passenger (consumer) is the responsibility of the passenger. In this case the transporter (business actor) cannot be held accountable. The party that is charged with proving that fault lies with the consumer.

3. The Principle of Strict Liability

The principle of strict liability is often identified with the principle of absolute liability. However, there are also experts who distinguish the two terms above. There is an opinion that states, strict liability is a principle of liability that determines fault not as a determining factor. However, there are exceptions that allow for exemption from liability, for example in circumstances of force majeure. On the other hand, absolute liability is the principle of liability without fault and there are no exceptions. According to E. Suherman, strict liability is equated with absolute liability, in this principle there is no possibility of freeing oneself from liability, except if the loss arises due to the fault of the party who is injured himself/herself. Liability is strict.

4. The Principle of Liability with Limitation

The principle of responsibility with limitations (limitation of liability principle) is often used by business actors to be included as

an exonation clause in the standard agreement that they make. In a film printing washing agreement, for example, it has been determined, if the film to be washed or printed is lost or damaged (including due to the officer's fault), then the consumer is limited to compensation of ten times the price of one new roll of film.

The supervisor in the BUMDes is bound by all forms of the liabilities above because he/she has the obligation to discuss the performance of the BUM Desa at least once a year and has the authority to establish policies for the development of business activities of the BUM Desa and has the authority to carry out monitoring and evaluation of the performance of the Operational Executor. of the BUMDes.

## CONCLUSION

BUM Desa is a non-legal entity business entity based on the provisions in Law Number 6 of 2014 and based on the existing characteristics of the BUM Desa which is obtained from the statutory regulations regarding the establishment of BUM Desa, namely Law Number 6 of 2014 concerning Villages, Government Regulation Number 43 of 2014 concerning Implementing Regulations of Law Number 6 of 2014 concerning Villages, and Regulation of the Minister of Home Affairs Number 39 of 2010 concerning Village-Owned Enterprises. However, in its development, the BUM Desa can be upgraded to become a legal entity so that it can obtain its rights as a legal subject.

Supervisors within the BUMDes are also responsible for BUMDes bankruptcy if it is proven that the BUMDes bankruptcy is also due to the fault. Because the supervisor has this responsibility because he/she has the obligation to discuss the performance of BUM Desa at least once a year and has the authority to establish policies for the development of business activities of the BUM Desa and has the authority to carry out monitoring and evaluation of the performance of the Operational Executor of the BUMDes.

## REFERENCES

Amalia, Euis. (2015). Mekanisme Pasar dalam Kebijakan Penetapan Harga Adil dalam Perspektif Ekonomi Islam. *Al-Iqtishad: Journal of Islamic Economics*, 5(1). <https://doi.org/10.15408/aiq.v5i1.2106>

Ambarwati, Eka. (2018). *Pengembangan Potensi Pariwisata Religi (Studi Kasus Pada Makam Kyai Ageng Sutawijaya di Desa Majasto Kecamatan Tawangsari Kabupaten Sukoharjo)*. 12. Retrieved from <https://www.google.com/url?sa=t&source=web&rct=j&url=http://eprints.ums.ac.id/68947/16/NASKAH%2520PUBLIKASI-16.pdf&ved=2ahUKEwjopuK6n9rmAhut7XMBH eDMB8kQFjAFegQIARAB&usg=AOvVaw1YYBih eMMsprMW5mNHAwd1>

Desa, Kementerian, Tertinggal, Pembangunan Daerah, & Transmigrasi, R. I. (2014). Undang-Undang Nomor 6 Tahun 2014 tentang Desa. *Jakarta: Biro Hukum Organisasi Dan Tata Laksana*.

Desa, Pemerintahan. (2014). *www.bphn.go.id. Hukumonline.com*. (n.d.). *Pandangan Jimly Terkait Perppu Penanganan Covid-19 ... Halaman 2 - hukumonline.com*. Retrieved from

<https://www.hukumonline.com/berita/baca/lt5eaf518c0f3c3/pandangan-jimly-terkait-perppu-penanganan-covid-19?page=2>

Nomor, Undang Undang Republik Indonesia. (6AD). *tahun 2014 tentang Desa*.

Ramadana, Coristya Berlian. (2013). Keberadaan Badan Usaha Milik Desa (BUMDES) sebagai Penguatan Ekonomi Desa. *Jurnal Administrasi Publik*, 1(6), 1068–1076.

Ridwan, H. R. (2006). *Hukum Administrasi Negara*, Jakarta: PT. Raja Grafindo Persada.

Shidarta, Hukum Perlindungan Konsumen Indonesia, & Revisi, Edisi. (2006). Gramedia Widiasarana Indonesia. *Gramedia Widia Sarana Indonesia, Jakarta*.

Suherman, E. (1979). Masalah Tanggung Jawab pada Charter Pesawat Udara. *Jurnal Hukum & Pembangunan*, 9(1), 1–28.

UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 7 TAHUN 2014 TENTANG PERDAGANGAN. (2014).

Yustisia, Tim Visi. (2015). *Undang-Undang Nomor 6 Tahun 2014 Tentang Desa dan Peraturan Terkait*. Visimedia.